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Keeping the Government's Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches

Teresa A. Miller*

I. THE PROBLEM OF PRIVACY IN THE DOCTRINE OF CROSS-GENDER SEARCHES

The power of privacy is diminishing in the prison setting, and yet privacy is the legal theory prisoners rely upon most to resist searches by correctional officers. Incarcerated women in particular rely upon privacy to shield them from the kind of physical contact that male guards have been known to abuse.¹ The kind of privacy that protects prisoners from searches by guards of the opposite sex derives from several sources, depending on the factual circumstances. Although some form of bodily privacy is embodied in the First, Fourth, Eighth, and Fourteenth Amendments,² prisoners challenging the

* Associate Professor of Law, University at Buffalo School of Law. I would like to thank Athena Mutua, Elizabeth Mensch, and Martha McCluskey for their substantive comments and constructive criticism. I would also like to thank Isabel Marcus and Lucinda Finley for their support at early stages of my research. I owe Johanna Oreskovic a debt of gratitude for having the patience of a saint. Lastly, I would like to thank Joe Schneider for his assistance in researching this paper.

1. See Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State 2* (1996):

One of the clear contributing factors to sexual misconduct in U.S. prisons for women is that the United States, despite authoritative international rules to the contrary, allows male correctional employees to hold contact positions over prisoners, that is, positions in which they serve in constant physical proximity to the prisoners of the opposite sex.

2. First Amendment: *Canedy v. Boardman*, 91 F.3d 30 (7th Cir. 1996) (recognizing that a nudity taboo within Islam creates a protected privacy interest against observation while nude by guard of the opposite sex); but see *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993) (suggesting the First Amendment challenge to opposite sex search better heard as a Fourth or Eighth Amendment claim in the context of prison); *Simth v. Chrans*, 629 F. Supp. 606 (C.D. Ill. 1986)

constitutionality of cross-gender searches most commonly allege privacy violations under the Fourth Amendment proscription against "unreasonable" searches by the government.³ Increasingly, however, Eighth Amendment challenges to cross-gender searches are becoming more common in the wake of *Hudson v. Palmer*⁴ and *Turner v. Safley*.⁵

Hudson and *Turner* narrow the scope of privacy and lower the standard of review for policies which burden constitutional rights in prison. In *Hudson*, the U.S. Supreme Court held that the Fourth Amendment has no application in prison cells and suggested that the bodily privacy of prisoners was similarly extinguished.⁶ While only one federal circuit has read *Hudson* as broadly eliminating all claims to privacy by prisoners,⁷ the general

(holding that prisoner's claim to privacy under the First Amendment was untenable because the fact of incarceration limits constitutional sources of privacy). Fourth Amendment: *Bell v. Wolfish*, 441 U.S. 520 (1979) (recognizing that Fourth Amendment protects privacy by prohibiting "unreasonable" searches in context of visual body cavity searches); *Katz v. U.S.*, 389 U.S. 347 (1967) (holding that privacy is the primary interest protected by the Fourth Amendment). Eighth Amendment: *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993) (basing protection of women prisoners from intrusive, cross-gender clothed body searches on Eighth Amendment proscription against "unnecessary and wanton" infliction of pain). Fourteenth Amendment Due Process Clause: *York v. Story*, 324 F.2d 450 (9th Cir. 1963) ("the security of one's privacy against arbitrary intrusion by the police is basic to a free society and is therefore 'implicit in the concept of ordered liberty,' embraced within the Due Process Clause of the Fourteenth Amendment"), cert. denied, 376 U.S. 939 (1964). The Ninth Amendment was explicitly rejected as an independent source of privacy in *Fair v. Brown*, 1990 U.S. Dist. LEXIS 13428.

3. U. S. Const. amend. IV. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable search and seizures"

4. *Hudson v. Palmer*, 468 U.S. 517 (1984).

5. *Turner v. Safley*, 482 U.S. 78 (1987).

6. *Hudson*, 468 U.S. at 527-28. ("A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order."). The court goes on to emphasize that "[l]oss of freedom of choice and privacy are inherent incidents of confinement." *Id.* at 528 (quoting *Bell v. Wolfish*, 441 U.S. 520, 537 (1979)).

7. See *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995), cert. denied, 519 U.S. 1006 (1996) (interpreting *Hudson* as holding that prisoners have no reasonable expectation of privacy under the Fourth Amendment). "Wolfish assumed without

effect of the case was to limit drastically the degree of privacy to which prisoners could lay claim. This remnant of a right to Fourth Amendment privacy inhered only to prisoners' bodies, particularly as to searches viewed or conducted by guards of the opposite sex.⁸ However, in *Turner*, the Supreme Court reduced to a rational basis the standard by which impingements on prisoners' privacy are judged. Any prison policy burdening a constitutional right became permissible so long as it was rationally related to a penological objective. In reducing the power of prisoners to assert privacy-based challenges to prison regulations, the Supreme Court made it painfully clear that courts were not to second guess the judgements of prison officials. In effect, the Court elevated the judgements of correctional authorities to a near dispositive level.

Privacy as interpreted by the federal courts is therefore problematic for incarcerated men. When male prisoners invoke privacy doctrine for protection against unwanted intrusions upon their bodies by guards of the opposite sex, they frequently run into doctrinal roadblocks. In *Sex & Surveillance: Gender, Privacy and the Sexualization of Power in Prison*,⁹ I contend that there is a great deal of confusion within the rules regulating cross-gender searches and that much of the confusion stems from misconceptions about how power and sex influence

deciding that prisoners retain some right of privacy under the Fourth Amendment. Five years later the Court held that they do not." *Id.* 146.

8. See *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981); *Covino v. Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992) (concluding that there is "little doubt that society is prepared to recognize as reasonable the retention of a limited right of bodily privacy even in the prison context"); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1415 (9th Cir. 1992), cert. denied, 510 U.S. 931 (1993) (recognizing that prisoners retain the right to bodily privacy); *Michenfelder v. Sumner*, 860 F.2d 328, 333-34 (9th Cir. 1988); *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982) (per curiam); see also *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir.1994) ("[O]ne of the clearest forms of degradation in Western Society is to strip a person of his clothes. The right to be free from strip searches and degrading body inspections is thus basic to the concept of privacy.") (quoting 3 *Privacy Law and Practice* ¶ 25.02[1] (George B. Trubow ed., 1991)).

9. Teresa A. Miller, *Sex & Surveillance: Gender, Privacy & the Sexualization of Power in Prison*, 10 *Geo. Mason U. Civ. Rts. L.J.* 291 (2000).

interactions between guards and prisoners.¹⁰ Among these misconceptions are biases about the sexual vulnerability of female guards, biases that negatively affect the physical security of male prisoners.¹¹ When federal judges establish the parameters of cross-sex contact between guards and prisoners, they are strongly influenced by the stereotypes of men as sexual aggressors and women either as sexual victims (female prisoners) or asexual nurturers (female guards).¹² These stereotypes are powerful. In fact, they elevate stereotyped notions of power within traditional gender roles over the actual disparity of power that exists between correctional officers and inmates.¹³ Thus, judges tend to deploy privacy primarily as a means of protecting sexually vulnerable women—both guards and prisoners—from sexually aggressive men.¹⁴ As a result, the sexual vulnerability of male prisoners is rarely acknowledged and the link between searches and sexual violence against male prisoners—commonly occurring at the hands of fellow inmates—remains largely unexplored.¹⁵

Furthermore, the stereotype of the sexually aggressive male prisoner is bolstered by the fact that the privacy of male prisoners is defined in opposition to the employment rights of women guards. As I observed in *Sex & Surveillance*, federal judges position the privacy rights of prisoners and the employment rights of guards in diametric

10. See *id.* at 294.

11. See *id.*

12. See Rebecca Jurado, *The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 *Am. U. J. Gender Soc. Pol'y & L.* 1 (1999).

13. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (an early cross-gender search case in which judges presumed the sexual vulnerability of women in prison by virtue of their sex alone and prohibited them from working in contact positions in male maximum security penitentiaries within the Alabama prison system); see also Miller, *supra* note 9, at 309; Jurado, *supra* note 12, at 25, 53 (asserting that courts adopted a gendered stereotype of women as lacking power over men, "even when women hold the keys to the prison.").

14. In at least one case, *Bagley v. Watson*, 579 F. Supp. 1099 (D. Or. 1983), male prisoners who invoked privacy to prevent female guards from visually monitoring them in states of undress—gazing upon their naked bodies—were characterized as either insincere or neurotic.

15. See Miller, *supra* note 9, at 309.

opposition.¹⁶ Therefore, when federal judges expand the employment opportunities of women in the traditionally male field of corrections by employing women in positions previously reserved to men—as they are mandated to do by Title VII of the Civil Rights Act of 1964—the scope of privacy for male prisoners is subsequently diminished. In other words, women assigned to “contact” positions within men’s prisons are permitted to monitor visually the naked bodies of men toileting, showering, and undressing and to perform random, suspicionless hands-on searches such as pat frisks and clothed body searches. This assignment results in less privacy for male prisoners. In addition, the stereotype of the sexually aggressive male prisoner assists judges in rationalizing the loss of privacy.

Nevertheless, the doctrine of privacy is also problematic for incarcerated women,¹⁷ although it raises a different set of issues for women challenging the validity of searches conducted by male guards. The primary problem for men is that privacy doctrine emerges from concerns about the equal employment of women and is ill-suited to protecting men from the risk of sexual assault posed largely by fellow inmates. In contrast, women are precisely the group that judges seek to protect when they determine the scope of privacy in the context of cross-gender searches. Yet the basis of their privacy protection lies in stereotypes of women that are consistent with women’s traditional sex roles. These stereotypes reflect gender perceptions of

16. *Id.* at 297.

17. Although an in-depth examination of the problems the doctrine poses for guards is beyond the scope of this paper, the fact that the doctrine of cross-gender searches poses problem for women guards as well as inmates is significant because the problems are interrelated. Guarding prisoners has traditionally been a man’s job. Prior to Title VII’s legislative prohibition of sex discrimination in employment, women were confined to non-contact positions within men’s prisons and underrepresented as guards within women’s prisons. As such, women prisoners were substantially more likely to be closely guarded by men. Ironically, after the passage of Title VII, states that did restrict the duties of male guards working in women’s prison began to eliminate these restrictions when they eliminated barriers to women working in men’s prison in order to treat men and women equally. Consequently, in the federal prison system and in most state prisons, women are still more frequently guarded by men than women.

female criminal offenders as "fallen women" in need of correction that will return them to their proper roles as mothers, wives, and daughters.¹⁸

In *The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*,¹⁹ Rebecca Jurado examines how courts manipulate gendered stereotypes of male and female prisoners and guards within the doctrine of cross-gender searches to achieve results consistent with their beliefs about the traits of men and women. Jurado compares the scope of privacy for male and female prisoners and concludes that incarcerated women are afforded more privacy than their male counterparts.²⁰ She suggests that the disparity results from the impact of gendered dualisms²¹ (or opposing pairs of stereotypes) on the legal standards establishing the scope of privacy. For example, under the Fourth Amendment, privacy is measured by the degree to which society is prepared to recognize that a prisoner's subjective expectation of privacy is legitimate.²² Likewise, cross-gender searches run afoul of the Eighth Amendment when they subject prisoners to more than de minimis physical or psychological harm, a standard that has been linked to "vulnerabilities" associated with gender socialization.²³ It is easy to see how the stereotype of "hardened, aggressive men," coupled with "vulnerable women," applied to these standards would result in vastly different levels of protection for male and female prisoners.

Consistent with the early history of women's

18. See Jurado, *supra* note 12, at 37.

19. *Id.*

20. *Id.* at 46-47 (concluding that the adoption of gender difference as a factor controlling the extent to which prisoners are afforded privacy led to incarcerated women having more privacy than their male counterparts).

21. Jurado contends that the history of the U.S. prison system reflects gendered stereotypes of both prisoners and guards. She further contends that these stereotypes—conceptualized by gender scholars as dualisms or opposing pairs of stereotypes—are reflected in contemporary philosophies of employment and incarceration.

22. See *Hudson v. Palmer*, 468 U.S. 517, 526 (1984).

23. See Jurado, *supra* note 12, at 51-52 (discussing *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993)).

incarceration—particularly the separate reformatory system which sought to return “fallen” women to their proper societal roles as chaste, domestic and girlish mothers, daughters, and wives²⁴—judges employ stereotypes of incarcerated women as modest and in need of protection from their own sexuality. From this paternalistic construction of women prisoners’ privacy needs, Jurado contends, judges rationalize limiting the authority of male guards to search women’s bodies and to monitor them visually in states of undress in their living quarters. For men, incarceration has historically been based upon a military model of harsh conditions of confinement, close surveillance, and swift discipline for rule infractions. Consistent with this model, the stereotype of hardened men accustomed to harsh conditions is employed by judges to justify narrowly construing their privacy needs. This limited notion of men’s privacy needs, combined with the stereotype of female correctional workers as asexual nurturers and mothers, joins the contemporary imperative of Title VII to provide equal employment opportunities to women and justifies allowing women guards to search physically the bodies of male prisoners and to monitor them visually in states of undress in their living quarters. However, as Jurado points out, the converse is not true. The broader judicial construction of women’s privacy needs is balanced against a less weighty interest in expanding the employment opportunities of men in women’s prisons.

Undeniably, incarcerated women need the protection of privacy to police appropriate and inappropriate governmental intrusions upon their bodies at the hands of male guards. There is a strong correlation between cross-gender searches and custodial sexual misconduct among male guards. The power disparity that exists between men and women in society is magnified within the rigidly hierarchical and closed prison apparatus. Power is

24. See Jurado, *supra* note 12, at 53; Nicole Hahn Rafter, *Partial Justice: Women, Prisons and Social Control* 49 (2d ed. 1990).

sexualized in prison.²⁵ Because prison guards exercise near total authority over prisoners, the potential for male guards to abuse their legitimate access to women's bodies to conduct bodily searches of women and to visually monitor them nude or only partially dressed in ways that are overtly sexual is great. Indeed, in a major report on the sexual abuse of women prisoners, Human Rights Watch found that male correctional officers misused their search authority to have inappropriate sexual contact with female prisoners.²⁶

This finding led to a recommendation that all states limit cross-gender strip searches, pat-frisks and inappropriate cross-gender visual surveillance of female prisoners.²⁷

The link between cross-gender searches and custodial sexual misconduct uniquely burdens women prisoners because women are more likely than men to be subjected to cross-gender searches²⁸ and more likely than men to be the objects of custodial sexual misconduct.²⁹

25. See generally Miller, *supra* note 9.

26. Human Rights Watch, *supra* note 1, at 1-2 (noting that "[m]ale officers have used mandatory pat-frisks or room searches to grope women's breasts, buttocks, and vaginal areas and to view them inappropriately while in a state of undress in the housing or bathroom areas.").

27. *Id.* at 13-14. In an expose on violations of women's human rights, Amnesty International reported the concerns of the Human Rights Committee that the practice of assigning men to guard women prisoners in contact positions leads to the sexual abuse of women prisoners and the invasion of their privacy. The committee called on states to amend legislation to provide that male officers guarding women would always be accompanied by a female officer. See Amnesty International, "Not Part of My Sentence": Violations of Human Rights of Women in Custody 55-56, AMR 51/01/99, Mar. 1999.

28. Although the state prison systems vary in their correctional staff demographics and search policies, in general, women are more likely to be guarded by men and men are less likely to be guarded by women because of the vastly greater number of incarcerated men and the general underrepresentation of women in the field of corrections. Unless a state department of corrections takes it upon itself to limit the assignment of men to contact positions in women's prisons—as Hawaii and Wisconsin have done in the past—the general trend stands. Such limitations frequently contravene labor union contracts forbidding gender-based correctional staff assignments. See generally Amnesty International, *supra* note 27, at 52.

29. Custodial sexual misconduct certainly occurs in men's prisons; however its occurrence at the hands of female guards is far less frequent than its corollary in

Despite the needed protection afforded to women by the invocation of stereotypes, the concept of privacy as it has been applied to cross-gender searches presents difficulties for both men and women. Prisoners need to be able to shield their bodies in order to preserve their human dignity, but privacy as it is currently formulated is too susceptible to harmful gender bias. An understanding of privacy that is highly contextualized and grounded in fundamental respect for human dignity and bodily integrity is needed. Privacy conceptualized as a right to bodily integrity would inhere to the human body—rather than rely on biased notions of modesty—and would therefore reflect a dual standard for men and women. Moreover, if courts determined the degree to which prisoners need protection from cross-gender searches based upon concrete, case-by-case determinations of institutional safety and prisoner vulnerability in specific factual settings, privacy would be less likely to reflect gendered stereotypes and ideals.

There are tremendous conceptual difficulties in basing the protection of women subject to cross-gender searches on gendered stereotypes about men and women. First, by employing stereotypes of women that afford female prisoners greater privacy than male prisoners, federal judges have constructed a doctrinal “bubble” around incarcerated women. Within this limited bubble, judges’ concern for the modesty of incarcerated women is linked to stereotyped notions of women in traditional roles as mothers, asexual nurturers, and sexual victims. The greater degree of protection afforded women prisoners through privacy doctrine is wildly disproportionate to the harsh treatment of women in every other aspect of their incarceration. As a small minority of prisoners viewed as extrinsic to the “traditionally male” system of imprisonment, women are generally disadvantaged in comparison to their male counterparts. For example,

women’s prisons. Furthermore, whereas most sexual assaults on women prisoners are perpetrated by male guards and staff, most sexual assaults on male prisoners are committed by fellow prisoners.

women constitute a mere six percent of all prisoners. Consequently there are far fewer correctional facilities in which to confine them. Within the existing facilities, women tend to be "over-incarcerated,"³⁰ that is confined in higher security facilities even though they commit far fewer violent crimes than men. Women are also incarcerated farther away from home than men, in general, making visitation more arduous and increasing the likelihood that family ties will deteriorate. Women's prisons generally lack the kind of vocational training provided in men's prison and which creates better employment options for men when they are released from prison. Yet courts have refused to interpret the Equal Protection Clause of the Fourteenth Amendment to require the same programs in men's and women's prisons, finding instead that incarcerated men and women are not similarly situated.³¹

Second, gendered stereotypes are a shaky foundation upon which to base needed protections for incarcerated women when there is so little that remains of privacy. In light of *Hudson* and *Turner*, cases which narrowly restricted the scope of Fourth Amendment privacy in prison and revived the "hands off" approach to judicial review of search policies prison officials insist are necessary to maintain internal order, the stereotypes are almost all that remain of privacy in prison. When these stereotypes are exploded, there is little left with which to protect incarcerated women from sexualized abuses of power.

Third, the gendered stereotypes upon which judges rely in expanding the privacy rights of women are harmful because they actively participate in constructing the reality of everyday prison life. For example, when judges presume the sexual vulnerability of female prisoners, they conversely presume that male guards are sexually

30. See Dreama G. Moon et al., *Women Prisoners: A Forgotten Population* 12-13 (1990).

31. See *Klinger v. Dep't of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994), cert. denied, 513 U.S. 1185 (1995), aff'd in part, rev'd in part, and vacated in part on other grounds, 107 F.3d 609 (8th Cir. 1997).

aggressive. When judges employ gendered stereotypes of men as sexually aggressive, and therefore limit the assignment of male guards within the housing units of women's prisons, they are accepting as a given that male guards are unable to respect the human dignity of women when observing them nude in the act of toileting, showering, and undressing. In accepting this duality of aggression and vulnerability, judges are not just rationalizing outcomes they can feel comfortable with on the basis of presumed traits. They are actually constructing a reality within prisons. They are ultimately writing rules around the fact that "boys will be boys" rather than facilitating a culture change within prisons that requires male guards to conduct themselves professionally, and in the process, to respect the basic human dignity of women prisoners.

Take, for example, the rules regarding the accommodation of privacy where guards visually monitor nude prisoners in the acts of toileting, showering, and undressing. Rebecca Jurado invokes the cross-gender surveillance case of *Forts v. Ward*³² to demonstrate the

32. *Forts v. Ward*, 434 F. Supp. 946 (S.D.N.Y.), rev'd, 566 F.2d 849 (2d Cir. 1977), remanded to 471 F. Supp. 1095 (S.D.N.Y. 1978), vacated in part on other grounds, 621 F.2d 1210 (2d Cir. 1980). In *Forts*, women incarcerated in maximum security Bedford Hills (N.Y.) Correctional Facility challenged a newly initiated policy of assigning male guards to monitor the prisoners visually in the infirmary and in their living quarters. The district court initially enjoined the policy, holding that it violated the women's constitutional right to privacy without serving a compelling state interest. *Forts*, 434 F. Supp. at 949. The district judge was particularly troubled by the lengths to which female inmates were required to go to preserve their privacy. Although partial curtains covered the doorway of each cell, Judge Owen was concerned by allegations that male officers peeked over the curtains and pushed them aside. He was also concerned that male guards could observe the partially naked bodies of female prisoners while they slept and that female prisoners were required to discuss "personal, female problems" with hospital staff in the presence of male officers. *Id.* at 949. Consequently, Judge Owen later rejected proposals by the State defendants to accommodate the women's privacy by issuing "Dr. Denton" sleepwear upon request and changing the prison rules to allow the women a fifteen-minute interval in which to cover their cell door windows at night. *Forts*, 471 F. Supp. at 1099. On remand from the Second Circuit, the district judge, *inter alia*, prohibited male guards from patrolling the housing units at night when inmates could be observed by guards in states of undress. *Id.* at 1101. On appeal, the

absurd results of attempts to accommodate conflicting claims to privacy by incarcerated women and to employment rights by male guards. The accommodations included requiring the State of New York to provide Dr. Denton sleepwear—those footed pajamas reminiscent of childhood—that would completely encase the women's bodies, thereby making them less alluring to the guards and allowing female prisoners to cover their cell doors for fifteen minutes at night so they could attend to "personal hygiene." Nevertheless, Jurado observes that when male prisoners challenging cross-gender surveillance policies in men's prisons similarly seek to shield their bodies from the prying eyes of female guards, federal courts refuse to provide accommodations.³³

Thus, judges accepting the stereotype of the sexually vulnerable female (and the correlative stereotype of sexually aggressive male guard) and using it as a basis for affording women prisoners (and refusing male prisoners) privacy accommodations, construct an environment in

Second Circuit vacated the part of Judge Owen's order that banned male guards from nighttime assignments in the inmates' living quarters, finding the accommodations proposed by the Department of Corrections to be sufficient to protect both the privacy interests of the inmates and the employment interests of the guards. *Forts*, 6210 F.2d at 1217.

33. See Jurado, *supra* note 12, at 38. Jurado contrasts the Second Circuit's accommodation of female prisoners' privacy in *Forts* with male prisoners' privacy-based challenges in *Somers v. Thurman*, 109 F.3d 614 (9th Cir.), cert. denied, 522 U.S. 851 (1997), *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988), and *Grummet v. Rushen*, 779 F.2d 491 (9th Cir. 1985), to make the point that the judicial policy of accommodating prisoners' privacy is gender-specific. In other words, where men seek privacy protection from the eyes of female guards upon their naked bodies, judges deny them relief. In each of these three Ninth Circuit cases, male prisoners sought to keep the eyes of female prison guards off their bodies when they were undressed. *Somers* involved female guards conducting visual body cavity searches on a male inmate on a regular basis in violation of prison regulations prohibiting unclothed body inspection by guards of the opposite sex absent an emergency. *Michenfelder* involved strip searches of male prisoners in view of female guards. *Grummet* involved female correctional officers viewing male inmates partially or totally nude while dressing, showering, being strip searched, or toileting. In none of these cases did the Ninth Circuit seek to accommodate the privacy concerns of male prisoners. And in each of these cases, internal security and equal employment were factored against a broader interpretation of male prisoners' privacy rights.

prisons that privileges male sexual irresponsibility. In the process, judges (including the district court judge and the Second Circuit panel in *Forts*) end up juggling choices among footed pajamas, translucent privacy screens, and mottled glass shower doors rather than insisting on a culture change that would require male guards to respect the human dignity of female prisoners.³⁴

Thirdly, the use of gendered stereotypes to expand the privacy of women prisoners is problematic because judges idealize, rather than contextualize, the experiences of incarcerated women. In doing so, they overlook the protection of those women whose experiences do not fit the stereotype. Judicial resolution of privacy-based challenges to cross-gender search policies requires a contextualized understanding of how the many varied aspects of men and women prisoners' identities shape their privacy expectations. Gender does not exist in isolation from other components of the identities of male and female prisoners. The men and women subjected to cross-gender searches possess racial and class attributes and sexual histories that influence their perceptions of cross-gender searches. These attributes also influence judicial perceptions of prisoners' sensibilities and guards' behavioral proclivities. Among women incarcerated in the U.S., most are women of color, and most are poor. Many are lesbian, bisexual, and/or transgendered. All these factors complicate how incarcerated women as well as men experience cross-gender searches. Factor in as well the race, class, and sexualities of the guards conducting the searches and a judge would be hard pressed to discern the parameters of privacy in a manner that addresses the complex realities of

34. Further evidence that the environment within many prisons privileges masculinist values is the fact that female correctional officers broadly complain of sexual harassment by their male colleagues. Women guards report being propositioned in front of inmates by their male colleagues and being threatened with poor duty assignments or termination to gain their sexual acquiescence. The harassment serves to reinforce the status of women guards as "outsiders" in a field traditionally reserved to men. See Jocelyn Pollock, *Women in Corrections*, in *Women, Law and Social Control* 97, 101 (Alida Merlo & Jocelyn Pollock eds., 1995).

prison life. Perhaps that is why judges have largely failed to consider the sexuality of guards and prisoners in their legal analysis of privacy in cross-gender searches,³⁵ despite its obvious relevance in the highly sexualized prison environment.

Failing to consider how sexuality complicates the privacy analysis in cross-gender search cases provides a powerful example of how courts fail to contextualize privacy. Judges construct a doctrine that overlooks the needs of—and consequently under-protects—lesbian, bisexual, and transgendered women.³⁶ A heterosexual presumption lurks within the doctrine of cross-gender searches. Judges limit their privacy analysis of surveillance in prisoners' living quarters—where they may be observed naked while showering, toileting, and undressing—to searches conducted by guards of the opposite sex. When judges place limits on cross-gender surveillance of naked prisoners by guards of the opposite sex, they assume that its is degrading to be view unclothed by a stranger of the opposite sex only.³⁷ This presumes that

35. But see *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994). The Canedy court pointed out the presumption of heterosexuality within the cross-gender search cases:

We note that York [*v. Story*], many of the cases discussed below involving cross-gender observations and strip searches, as well as Canedy's brief on appeal here, make a common assumption. In their declaration that "the nudity taboo, and hence the invasion of privacy involved when it is forcibly broken, is much greater between the sexes than among members of the same sex," Pl. Br. at 13, these authorities and submissions appear to assume that all of the relevant actors are heterosexual.

Id. at 185 n.1 (emphasis added). Citing Canedy, the Seventh Circuit in *Johnson v. Phelan* refused to consider the sexuality of guards and prisoners in its privacy analysis, stating that "[t]here are too many permutations to place guards and prisoners into multiple classes by sex, sexual orientation, and perhaps other criteria, allowing each group to be observed only by the corresponding groups that occasion the least happiness." 69 F.3d 144, 147 (7th Cir. 1995), cert. denied, 519 U.S. 1006 (1996).

36. In fact, lesbian and transgendered inmates are often singled out for sexual misconduct by guards. See Human Rights Watch, *supra* note 1, at 2.

37. This is evidence of a judicial assumption that a certain power dynamic is at work that links the probability of guard misconduct to prisoner vulnerability. In cross-gender search doctrine, the power dynamic is always gendered and (hetero)sexed (i.e., female prisoners are presumed to be at greater risk when male

the relevant actors are heterosexual and precludes the application of a privacy analysis in situations where guards gaze upon the naked bodies of same-sex prisoners or intrusively touch their bodies.³⁸ This assumption was recently acknowledged by the Seventh Circuit Court of Appeals on two occasions.³⁹ However, because prisons are sites of complex and transitional sexualities, judges must factor sexual orientation into their gender analysis if they are to interpret privacy in a manner that deals realistically with the contours of life in prison. Until they do, gender stereotypes within the doctrine of cross-gender searches will remain a shaky foundation upon which to support women's privacy.

II. WHAT MIGHT A FEMINIST ANALYSIS OF PRIVACY IN CROSS-GENDER SEARCHES LOOK LIKE?

Feminist legal theory has grappled with the benefits and shortcomings of a privacy-based approach to securing women's liberty and equality for the past forty years. Ever since *Roe v. Wade*,⁴⁰ when the U.S. Supreme Court read the constitutional right of privacy to protect women from

guards visually monitor them in states of undress than when male prisoners are identically monitored by female guards).

38. See Miller, *supra* note 9, at 351:

[One] aspect of confusion within the doctrine of cross-gender searches relates to an unspoken, nevertheless pervasive assumption that only visual surveillance by a member of the opposite sex is problematic. There are many instances of sexual intimidation through gazing, which cannot be addressed within a conventional heterosexual paradigm of gender. The fact that same sex surveillance of the nude bodies of prisoners is implicitly unproblematic in these cases is troubling. It is evidence of a heterosexual presumption that is hardly appropriate in the transgendered context of prison. Furthermore, it exempts from judicial scrutiny the same type of sexually intimidating gazing that, if practiced across gender or in the (non-carceral) workplace, would be problematic. Male prisoners observed naked by gay male guards have no cognizable Fourth Amendment claim; likewise for female prisoners viewed naked by lesbian guards. And what of transgendered prisoners under the eye of guards of either sex? (citation omitted).

39. See cases cited *supra* note 35.

40. *Roe v. Wade*, 410 U.S. 113 (1973)

governmental intrusion into the choice of whether or not to terminate pregnancies, feminists have closely analyzed the evolution of privacy doctrine and its implications for women's empowerment. First, they have criticized the protection of women's reproductive freedom through the creation of separate spheres. Catherine MacKinnon observed that within the liberal state, the tension between precluding governmental intrusion and protecting personal self-action was resolved by the judicial demarcation of a private sphere of marriage, home, and family, in which the state is restrained from intruding into matters of (hetero)sexuality, including contraception, pornography, and abortion.⁴¹ MacKinnon criticized this doctrinal approach—translating the ideology of the private sphere into an individual legal right to privacy—as a means of subordinating the collective needs of women to the imperatives of male supremacy.⁴² Privacy doctrine protects women's procreative choices by prohibiting governmental interference in the private sphere of home and family. Meanwhile, however, the exclusion of women from the public sphere leads to their dependence upon men for goods such as money, legal rights, and prestige.⁴³ This dependence, feminist legal theorists contend, reinforces the subordination of women in the lower-status private sphere, causing even extreme incidents of oppression within the private sphere—domestic violence, spousal rape—to go unnoticed by society.⁴⁴

Secondly, the feminist critique of privacy has drawn attention to the legitimating function of privacy that perpetuates the status quo by conceptualizing privacy as a negative right of protection against improper state

41. See Catherine A. MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade*, in *Feminism Unmodified: Discourses on Life and Law* 96 (1987).

42. See *id.* at 96-97.

43. See Laura Stein, *Living With the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality*, 77 *Minn. L. Rev.* 1153, 1162 (1993).

44. See MacKinnon, *supra* note 41, at 101; see also Elizabeth M. Schneider, *The Violence of Privacy*, 23 *Conn. L. Rev.* 973 (1991) (criticizing the separate spheres ideology within privacy doctrine for encouraging and reinforcing violence against women).

interference, but with no correlative, affirmative governmental obligation to guarantee reproductive freedom.⁴⁵ In this respect, asserts feminist legal scholar Laura Stein, privacy is "decidedly non-transformative."⁴⁶

Subsequent critiques of privacy doctrine by other feminist legal theorists followed and solidified what has been called the anti-privacy position of feminist legal theory.⁴⁷

More recently, a counter-critique emerged. Conceived by feminists of color, this racial critique of the feminist critique of privacy criticizes the rejection of privacy doctrine by feminist legal theorists for (1) narrowly defining women's reproductive freedom in terms of abortion rights rather than examining the range of forces limiting the reproductive liberty of poor women of color;⁴⁸ (2) failing to take into account the more complex, racialized significance of the private sphere "as the site of solace and resistance against racial oppression" for women of color;⁴⁹ and (3) identifying gender as the sole locus of women's oppression and therefore ignoring racial and economic subordination. Through counter-critique, these legal

45. See MacKinnon, *supra* note 41, at 100-02; Frances Olsen, *Constitutional Law: Feminist Critiques Of the Public/Private Distinction*, 10 *Const. Comment.* 319, 326 (1993) (explaining how, within the hierarchical context of the home and family, liberal notions of privacy maintain the status quo by assuming that the relevant actors are equals).

46. See Stein, *supra* note 43, at 1157.

47. See Rhonda Copelon, *Unpacking Patriarchy: Reproduction, Sexuality, Originalism and Constitutional Change*, in *A Less Than Perfect Union: Alternative Perspectives on the U.S. Constitution* (Jules Lobel ed., 1988); see also Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 *Stan. L. Rev.* 1 (1992); Ruth Colker, 3 *Colum. J. Gender & L.* 449, 478 (1993) (criticizing the class-based privilege found in privacy doctrine when it is applied to women who are seeking reproductive freedom); Ruth Colker, *Pornography and Privacy: Towards the Development of a Group-Based Theory for Sex-Based Intrusions of Privacy*, 1 *L. & Inequality: A Journal of Theory and Practice* 191 (1983) (examining privacy doctrine's failure to protect women from sex-based invasions of privacy).

48. See Dorothy E. Roberts, *Killing the Black Body: Race, Reproduction and the Meaning of Liberty* 300 (1997) [hereinafter Roberts, *Killing the Black Body*].

49. See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 *Harv. L. Rev.* 1419, 1471 (1991) [hereinafter Roberts, *Punishing Drug Addicts*].

scholars seek to reclaim the right of privacy for women of color.⁵⁰

Whereas MacKinnon's feminist critique of privacy emphasizes the shortcomings of privacy-based protections of women's reproductive choices, Roberts' racial critique of the feminist critique of reproductive privacy advances our understanding of how privacy—properly contextualized—can be reconstructed to make the doctrine more effective. MacKinnon faults the doctrine of procreative privacy for its liberal presumption that individuals act autonomously, freely, and equally in spite of huge disparities in power between men and women. MacKinnon further criticizes the doctrinal formulation of privacy for preserving the status quo by failing to destabilize the power disparities between men and women. Privacy is formulated as a negative right that entitles women merely to governmental non-intervention. MacKinnon contends that by failing to require social changes that would eliminate women's inequality to men, privacy doctrine perpetuates the sexual oppression that requires women to seek abortions in the first place (i.e., male control over sexuality).⁵¹

In contrast, Roberts resurrects the doctrine of privacy

50. Black feminists first articulated the counter-critique of privacy and sought to reclaim privacy for its valuing of personhood and protection of women against the abuse of governmental power. They recognized that the existing critique of privacy did not reflect the racial and class context in which women of color experience privacy, currently or historically. See Roberts, *supra* note 46; see also Peggy Cooper Davis, *Neglected Stories: The Constitution and Family Values* (1997). Indeed it is telling that Dorothy Roberts' pathbreaking article articulating the racial critique of the feminist critique of privacy, *Punishing Drug Addicts Who Have Babies*, deals with the criminal prosecution of poor Black female crack addicts for giving birth to infants who test positive for drugs. Because the lives of poor Black women are heavily regulated by state agencies—welfare, child protection, the foster care system, and the criminal justice system in particular—issues of procreative privacy frequently arise in the context of criminal prosecution or incarceration. More recently, other critical feminists have embraced the counter-critique. See, e.g., Nicola Lacey, *Unspeakable Subjects: Feminists Essays in Legal and Social Theory* 82 (1998) (“[F]rom a feminist point of view, it is far from clear that a critique of the public/private dichotomy should bring with it a total rejection of the notion that privacy can be valuable and ought sometimes to be protected by state and other powerful institutions.”).

51. See MacKinnon, *supra* note 41, at 97.

condemned by MacKinnon and reclaims it on behalf of women of color. Their historical experiences of being denied rights and being socially devalued as mothers underscore the significance of formulating protection of their procreative choices as a legal right—one that stresses the value of personhood and protects against totalitarian abuse of governmental power.⁵² Roberts criticizes the feminist critique of privacy for neglecting the concerns of poor women of color who simultaneously experience various forms of oppression “as a complex interaction of race, gender and class.”⁵³ She argues for a new jurisprudence of reproductive privacy that, *inter alia*, shifts the focus from state non-intervention to an affirmative guarantee of personhood.

Roberts demonstrates that examining the experiences of women in the context of racial discrimination and economic disadvantage and formulating a privacy right that protects them leads to a doctrine of privacy that advances social justice and more fully protects everyone.⁵⁴ For example, among women claiming procreative privacy, poverty, subordination, and racial oppression influence the nature of the privacy claim. In *Killing the Black Body: Race, Reproduction and the Meaning of Liberty*, Roberts explains that racial oppression and economic disadvantage shape the meaning of black women’s claims to procreative privacy.⁵⁵ She suggests that understanding the context in which their privacy claims arise—in other words by “addressing the *particular* concerns of Black women”⁵⁶—a fuller vision of reproductive freedom is realized:

[Black women’s] reproductive freedom, for example, is limited not only by the denial of access to safe abortions, but also by the lack of resources necessary for a healthy pregnancy and parenting relationship. Their choices are

52. See Roberts, Punishing Drug Addicts, *supra* note 49, at 1468.

53. *Id.* at 1424.

54. *Id.* at 1464.

55. See Roberts, *Killing the Black Body*, *supra* note 48, at 300.

56. *Id.* at 301.

limited not only by direct government interference in their decisions, but also by government's failure to facilitate them Addressing the particular concerns of Black women helps to expand our vision of reproductive freedom to include the full scope of what it means to have control over one's reproductive life.⁵⁷

The doctrine of privacy that has evolved in the context of cross-gender searches has barely been addressed from a feminist perspective, even though feminist legal theory has been extensively applied to the analysis women's procreative privacy. I can identify at least three possible reasons for this. At first glance, procreative privacy and the bodily privacy of prisoners appear unrelated. They are doctrinally distinct in that they derive from different constitutional guarantees. Procreative privacy derives from the liberty that the Due Process Clause of the Fourteenth Amendment, whereas constitutional protection against bodily searches by opposite sex guards derives primarily from the Fourth Amendment and Eighth Amendments. Nevertheless, the common goal of women prisoners subject to cross-gender searches and women making abortion-related decisions is bodily integrity—protection from governmental intrusions upon their bodies to prevent either termination of pregnancy or the physical search of their bodies. In other words, these women share the desire to keep the hands of the government off their bodies.

A second reason feminist legal theorists may have overlooked cross-gender searches is the deceptive appearance that women benefit from gendered stereotypes within the doctrine. The resolution of the conflict between prisoner privacy and the employment rights of guards has resulted in greater employment rights for women guards at the expense of privacy for male prisoners. In balancing the penological objectives of prison officials against the privacy interest of prisoners, courts have generally held that the

57. *Id.* at 300.

expectation of privacy for male prisoners is low⁵⁸ and that the penological objective of eliminating discrimination against women in staff pursuant to Title VII mandate is high.⁵⁹ Conversely, the resolution of the employment rights/privacy rights conflict has resulted in expanded privacy protections for women prisoners at minimal expense to the employment rights of guards. The reason is two-fold. Courts have generally held that the privacy interests of female prisoners are high (in other words higher than those afforded male prisoners) and therefore outweigh any de minimis burden on male guards' employment rights. The burden is de minimis because no mandate exists under Title VII to end sex discrimination against men in the field of corrections. In sum, judges are more comfortable seeing women search men than men search women, particularly when those searches involve visual surveillance of naked bodies toileting, showering, and sleeping or manual inspection of breasts and/or genitalia. Striking the balance between employment rights and privacy in favor of women prisoners did not, I suspect, elevate the critique of cross-gender search doctrine to a top priority for feminist legal scholars. Why fix a doctrine that does not appear to be broken—which, indeed, seems to benefit women over men?

A third reason feminist legal theorists may not have focused on cross-gender searches is that the experiences of poor women of color have been historically under-theorized by feminists—replicating the general failure of American legal theory to take an interest in the experiences of poor women of color. Prior to the work of Black feminists who challenged the notion of gender as the sole locus of women's oppression by describing the multiple oppressions of

58. See *Bagley v. Watson*, 579 F. Supp. 1099 (D. Or. 1983).

59. *Michenfelder v. Sumner*, 860 F.2d 328, 334 (9th Cir. 1988) (applying the rational relationship test of *Turner v. Safley*, 482 U.S. 78 (1987), and holding that the Nevada State Prison's deployment of female guards to monitor visually male prisoners while showering and within sight of strip searches was permissible because it was reasonable related to the legitimate penological objective of providing equal employment opportunities).

women of color (e.g., racial and economic, as well as sexual oppression), the privacy analysis of feminist jurisprudence reflected a white, middle-class bias that left unexplored the complex ways in which women of color, including incarcerated women, experience privacy. Once again, this replicates the failure of American legal theory generally to take an interest in the lives of prisoners.

Nevertheless, feminist legal theory and its insights into privacy can help prison scholars appreciate the shortcomings and advantages of relying upon privacy to protect prisoners from the prying eyes and hands of the state within the doctrine of cross-gender searches. Both the feminist critique of privacy and the subsequent racial critique of it give us tools for understanding the complex role of privacy claims in legal challenges to cross-gender searches.

In both procreative privacy and prisoners' bodily privacy, the deployment of sexualized, patriarchal power is similar. In critiquing the use of privacy to protect the rights of women seeking abortions, feminist legal theorists demonstrated that the division of the world into separate public and private spheres ultimately functioned to oppress women. Within the private sphere of home and family, patriarchal power is magnified by virtue of women's exclusion from the public sphere, and, women's power is diminished by their resulting dependence on men. As a consequence, extreme abuses of power within the home—such as domestic violence and spousal rape—go unnoticed by society.⁶⁰ Thus, privacy functions as a veneer that obscures the sexual oppression of women by protecting and simultaneously disempowering them in an isolated sphere. Likewise prisons—although they are quintessentially public institutions—exist within a separate, “closed” sphere of discipline and punishment. Federal courts hearing prisoners' privacy-based challenges to cross-gender searches traditionally weighed the institutional interests of the prison system against the interests of prisoners in

60. See Stein, *supra* note 43, at 1161-62.

bodily privacy. However, after *Turner* imposed a mere "rational basis" test on such challenges, the judgements of prison administrators became all but dispositive.⁶¹ Like the patriarchal authority of the husband within the traditionally ordered home, the authority of prison administrators within the prison cannot be gainsaid.⁶² Like the authority of the husband, the authority of prison officials who set cross-gender search policies is both patriarchal⁶³ and sexualized.⁶⁴ The exclusion of prisoners from the less controlled sphere of life outside of prison became more complete as conditions in prison became increasingly harsh and the Drug War's lengthy, mandatory minimum sentences made release dates more remote.

In addition to disempowering women in a separate sphere, feminists also criticize privacy for legitimating the status quo. This criticism is reflected in Jurado's discussion of gendered stereotypes in the doctrine of cross-gender searches. Jurado exposes the existence of a double-standard for accommodations of prisoners' privacy—women get accommodations; men do not. She demonstrates that the double-standard is rooted in gendered stereotypes about the traditional roles of men and women in penal and social ideology. Revealing the operation of gender biases in judicial determinations of the scope of prisoner privacy, Jurado illustrates how privacy in the prison context legitimates and preserves the status quo by looking to

61. "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if 'prison administrators' . . . and not the courts, are to make the difficult judgments concerning institutional operations." *Turner*, 482 U.S. at 89. Although *Turner* requires the policies of prison administrators to have a "legitimate penological objective," maintaining internal security is a legitimate objective broad enough in scope to justify almost any penal practice short of torture.

62. Ironically, the U.S. Supreme Court announced in *Hudson v. Palmer* that "a prison 'shares none of the attributes of privacy of a home . . .'" 468 U.S. at 527 (quoting *Lanza v. New York*, 370 U.S. 139, 143-44 (1962)).

63. Men have historically operated and administered the U.S. prison system. Even when women operated reformatories as matrons during the Progressive Era, they were confined by male authority to narrow, sexually stereotyped roles and excluded from men's prisons. See Rafter, *supra* note 24, at 46.

64. See generally Miller, *supra* note 9, at 293-95.

perceptions of modesty within men and women's traditional gender roles.⁶⁵

The racial critique of the feminist critique of privacy advances our understanding of the promise and limitations of privacy doctrine as it is applied to cross-gender searches. Its emphasis on understanding privacy in the context of the social and historical experiences of those claiming its protection suggests that analysis of the multiple oppressions of prisoners challenging cross-gender searches is necessary.

First, prisoners—like poor black women seeking access to safe abortions—assert privacy claims on a broad landscape of oppression. Stereotyped as either sexual aggressors or sexual victims and presumed to be heterosexual, their privacy claims are narrowly interpreted as claims about sexual morality. However, given the actual context in which prisoners raise privacy-based objections to cross-gender searches, they are more broadly contesting their denigration by the prison system. For example, the links between male guards having access to women prisoners in their housing units and custodial sexual misconduct clearly prompt privacy-based challenges to cross-gender searches by incarcerated women. But physical security is not the only goal these challenges seek to achieve. Prison life in an era of “getting tough” on prisoners and mass incarceration is dehumanizing. For many of the poor, mostly Black inmates who populate America's prisons and jails, this dehumanization by the state echoes similar experiences of personal devaluation in the welfare, foster care, and juvenile justice systems as well. Understanding these experiences of subordination helps us to view the privacy-based challenges to cross-gender searches more broadly as claims to human dignity and personhood generally denied prisoners. Thus, a concept of privacy that stresses both the value of personhood and protects against the totalitarian abuse of

65. The reliance is misplaced in the context of prisons, institutions in which gender and sexuality are very fluid concepts. See *id.* at 351.

power is needed.

Jurado's discussion of gendered stereotypes within the doctrine of cross-gender searches mirrors feminism's critique of privacy and similarly overlooks sources of oppression beyond gender. For example, Jurado recounts the historical reformatory treatment of women and how they were re-formed to embrace traditional societal roles. She describes the emergence of a gender dualism in the historical divergence of reformatory treatment from the custodial model of male punishment. However, the racial context in which the divergence occurred is ignored.

Race had a defining role in the gender-segregated reformatory system. Black women were excluded from this more benign form of incarceration. The heart of the reformatory philosophy was restoring "fallen" women to their traditional roles in society. The reformatory model emerged at a time in which massive European immigration and high unemployment put many women on the city streets, challenging traditional gender roles and sexual morality. The fact that most women who were committed to reformatories as youths were convicted of crimes against chastity attests to the broader social agenda of the reformatory movement to transform loose girls into respectable women. Black women were virtually excluded from the reformatory system because they were not seen as worthy of reform.⁶⁶ The abstraction of an idealized, genteel woman to which poor European immigrant women were being "trained" to conform never contemplated the inclusion of Black women. Therefore, Black women endured far harsher conditions of confinement within custodial prisons and did not benefit from the chivalry extended to white women.⁶⁷

In contrast to the feminist critique of privacy, the racial critique of the feminist critique sets as a benchmark respect for basic human dignity by interpreting women's

66. "Reformatory officials wished to work with women who were worthy of reform—a viewpoint that, for them and the judges who made the commitments, disqualified most blacks." Rafter, *supra* note 24, at 37.

67. *Id.* at 134

experiences of privacy in the context of race, class, and other factors specific to the prison setting. Consistent with the view of feminists of color, prison scholars analyzing privacy in cross-gender searches must consider the experiences of poor, incarcerated women of color and reconstruct a concept of privacy that protects prisoners from abuses of authority by guards by respecting bodily integrity and valuing personhood.

On the basis of anecdotal evidence alone, one can see that the experiences of poor women of color in New York State prisons exemplify the need for a contextualized notion of personal privacy that goes beyond gendered stereotypes to vest privacy in the body. In New York State, the vast majority of correctional facilities are located in rural areas, the majority of prison guards are white men who live in these rural areas, and the majority of incarcerated women are poor, Black, and from urban areas of New York State (primarily New York City's five boroughs). When a correctional officer puts his hands on a female prisoner or visually monitors her showering, toileting, or dressing, this gendered interaction—the search itself—occurs in a distinct racial and cultural context. It is no secret that most guards (male or female) prefer to work in men's prisons. Within the masculinist culture and history of imprisonment, men's prisons are where the "real work" is done, and women's prisons exist as an odd deviation from, or exception to, that tradition. From what I have observed teaching in and touring women's prisons in New York State over the past five years, the culture of female incarceration is one in which male guards do not respect prisoners because they fail to meet an ideal of female gentility that is white and middle-class.⁶⁸ The women whose lives they control bear little cultural resemblance to women they know as family or friends, and no resemblance at all to their idealized notion of womanhood. It is not uncommon to hear guards refer to

68. This is the same reason Black women were excluded from reformatories during the Progressive Era.

individual women by animal names (e.g., gerbil, bunny, and beast) and to describe units where they are housed with names appropriate to a zoo ("Jurassic Park" or the "Monkey House"). It is easy to see how sexual abuses of authority can occur in an environment where women are not respected and where sex can be used as a tool for disciplining women to fit a specific culture role. Every state has a different culture of female incarceration; nevertheless the experiences of women incarcerated in New York State furnish a good example of how the experiences of poor Black women argue for a concept of privacy that inheres to the body.

This reformulated, contextualized right of bodily privacy is simultaneously more particularized and more universal, in much the same way as Roberts suggests that privacy analyzed from the perspective of poor Black women contributes to the broader pursuit of social justice for all.⁶⁹ In spite of the fact that privacy has been gendered in the doctrine of cross-gender searches, a reconstructed right of privacy—one that recognizes privacy in the body itself, regardless of the sex—should not ignore significant differences in the privacy needs of men and women in the prison setting.

The construction of a strictly gender-neutral form of privacy risks reproducing oppression by turning a blind eye to differences in men's and women's experiences of incarceration.⁷⁰ For example, a right of privacy without

69. See *supra* note 54.

70. This is precisely the criticism feminist legal theorists and critical race scholars level at the liberal tradition in law. In applying legal principles assumed to be neutral to actors assumed to be equal and autonomous, the actual (but unacknowledged) inequality and hierarchy are perpetuated. Strict gender neutrality simply fails to save the day. In a critique of the existing legal and policy framework for examining women's poverty, critical race theorist Athena Mutua suggests an alternative approach with which to address issues of gendered oppression affecting both men and women. In the context of gendered oppression in *maquiladoras* affecting both Latinos and Latinas, Professor Mutua argues for legal interventions that are simultaneously women-focussed and men-focussed. Such an approach, Mutua suggests, has the advantage of neither foreclosing women-focussed coalitions nor hindering coalitions of women and men. Athena D. Mutua, *Why Retire the 'Feminization of Poverty' Construct?*, 78 *Denver U.L.*

regard to the sex of the person asserting it may afford prisoners certain minimal protections in body searches, but it would obviously afford no greater protection from bodily searches by guards of the opposite sex than by guards of the same sex. Thus, female prisoners would be at greater risk of the kinds of abuse by male guards that have historically plagued women's penal institutions (and that led to policies limiting cross-gender assignments in women's prisons in the first place). Instead, the racial critique of the feminist critique of privacy by feminists of color leads us to insist on a formulation of bodily privacy that takes into account the specific context in which cross-gender searches are being conducted, and in doing so, liberates privacy from the constraints of gendered stereotypes.

Such a conception of privacy is not foreign to the Constitution or the courts. In fact, courts deciding the constitutionality of cross-gender searches in prison have long looked to the Due Process Clause of the Fourteenth Amendment⁷¹ as a source of bodily privacy rooted in human dignity.⁷² In particular, the Ninth Circuit in *York v. Story* recognized that "personal dignity and elementary self-respect"⁷³ is the basis of the desire to shield one's naked body from the view of strangers, particularly strangers of

Rev. (forthcoming 2001).

71. The Due Process Clause of the Fourteenth Amendment reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

72. See e.g. *Grummet v. Rushen*, 587 F. Supp.; 913, 915 (N.D. Cal. 1984), *aff'd*; 779 F.2d 491 (9th Cir. 1985) *Somers v. Thurman*, 109 F.3d 614, 619 (9th Cir.), *cert. denied*, 522 U.S. 852 (1997); *Forts v. Ward*, 434 F. Supp. 946, 949 (S.D.N.Y.), *rev'd*, 566 F.2d 849 (2d Cir. 1977), *on remand*, 471 F. Supp. 1095 (S.D.N.Y. 1978), and *vacated in part* by 621 F.2d 1210 (2d Cir. 1980); *Bowling v. Enomoto*, 514 F. Supp. 201, 203 (N.D. Cal. 1981); *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994); *Csizmadia v. Fauver*, 746 F. Supp. 483, 491 n.11 (D.N.J. 1990); *In re Long*, 127 Cal. Rptr. 732, 736 (Cal. Ct. App. 1976); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1415 (9th Cir. 1992), *cert. denied*, 510 U.S. 931 (1993).

73. *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964) (finding that a complaint by a female crime victim who was involuntarily photographed naked in suggestive poses by a police officer who later copied and distributed the photographs to fellow officers stated a cause of action under the Due Process Clause of the Fourteenth Amendment).

the opposite sex. Thus, the vulnerability and degradation engendered when an individual is observed by strangers naked or stripped of her clothes is what this Fourteenth Amendment privacy right protects.

However, over the past twenty-five years, significant judicially imposed limitations upon the exercise of constitutional rights by prisoners have restricted the scope of privacy guaranteed by the Fourteenth Amendment's Due Process Clause. Thus, the ability of courts to animate the spirit of a privacy right based upon preserving and respecting prisoners' human dignity is correspondingly limited. Under the current penal regime, the human dignity of prisoners takes a back seat to internal security and punishment. With these priorities, the prison system is ultimately releasing individuals into the broader society who, by virtue of being degraded and dehumanized by prison search procedures, are less likely respect the human dignity of others.

